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No. 86-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES EDWARD KRUPPS, HAROLD O. EDGINGTON, HOWARD D. MATHEWS, SR., VINCENT ROSE, LATTIE JO DARBY ROSE, ROSIE HENLEY, AND JOHN ELLIS HENLEY,
Petitioners.

v.

STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari To The Texas Court Of Criminal Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a trial judge may constitutionally imprison a defendant and his supporters who, because of sincere religious beliefs, peacefully decline to stand when the judge enters or leaves the courtroom but who otherwise participate in the trial proceedings without obstruction and without lack of respect or deference?

Whether a trial judge may constitutionally imprison a defendant and his supporters who peacefully decline to engage in symbolic speech and fail to stand when the judge enters or leaves the courtroom but who otherwise participate in the trial proceedings with respect?

Whether the Due Process Clause of the Fourteenth Amendment prohibits a trial judge from summarily imprisoning for thirty days a defendant and his supporters who peacefully decline to rise for the judge but who otherwise participate in the proceedings without obstruction or lack of respect?

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OPINION BELOW

This Petition seeks review of a divided decision of the Texas Court of Criminal Appeals, which is reported at 712 S.W.2d 144 (Tex. Crin.. App. 1986) and reprinted as Appendix A.

The decision and judgment of the Court of Criminal Appeals was entered on June 11, 1986. Subsequently, this Court granted an extension until October 9, 1986 to file this Petition *sub nom. Lattie Jo Rose.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Petitioners urge that the Texas

court's use of criminal contempt power in this case is repugnant to the First and Fourteenth Amendments.

Further, the Texas Court of Criminal Appeals, a court of last resort, has decided a federal question in a way in conflict with the decisions of different federal courts of appeals (the Fourth, Ninth, and Seventh Circuits); the issues decided below are important questions of federal law which have not been, but should be, decided by this Court, especially in view of conflict of the Texas appellate ruling with applicable decisions of this Court. Rules of the Supreme Court of the United States, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

The Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

This case involves five men and two women who were sentenced to thirty days in jail for contempt of court for refusing, because of their sincere religious beliefs, to rise when the trial judge entered the courtroom.

The seven Petitioners were held in contempt on the second day of a trial, for which one of them, Charles Edward Krupps, was charged with the misdemeanor offense of driving without proof of liability insurance, punishable by a minimum fine of $75. Tex. Ann. Civ. Stat. art. 6701h, § 1C (Vernon Supp. 1986).

Petitioners were summarily sentenced to jail without an attorney and without a hearing. The confinement order is reprinted in Appendix B.

Before being released from jail on bond, six Petitioners spent fifteen days in confinement; fifteen days remain to be served. One Petitioner still has all thirty days to serve. Three Petitioners are in their early to mid-sixties. Some have minor children for whom they could not care while they were jailed, and one son was ordered imprisoned with his mother. When they were confined, Petitioners were subjected to the humiliating jail procedures of being stripped, searched, and imprisoned in cells with persons charged with criminal offenses.

Petitioners sought a writ of habeas corpus in the Texas Court of Criminal Appeals, the highest criminal appeals court in Texas, which, on a 5-4 vote, denied the writ and issued the opinion reprinted in Appendix A.

From that judgment, Petitioners have come to this Court.

Because the trial court held no contempt hearing and made virtually no record, the case was essentially decided by the Texas appeals court on the affidavits of the Petitioners, the trial judge, the bailiffs, and the assistant district attorney.

The facts are simple and uncontested in the main.

Petitioner Krupps was charged in the municipal court of Port Neches, Texas, for driving an automobile without proof of liability insurance. During that first trial, Mr. Krupps and other Petitioners, because of their religious beliefs, declined to stand when the municipal judge entered or left the courtroom at the beginning and end of the proceedings.

After being found guilty in the municipal court on the lack of insurance charge, Petitioner Krupps exercised his right to a *de novo* jury trial in Jefferson County Court at Law (Judge Donald J. Floyd, presiding).

As he did in municipal court, Krupps represented himself *pro se* in county court. There, after voir dire of the jury panel and adjournment for the day, the bailiff noticed that Krupps and the others did not rise when the judge exited; he told Krupps that he had to rise for the judge. Krupps replied, in the bailiff's words, that his religion and interpretation of the Bible prohibited him from rising on such occasion, that he could not bow to any man, but only to God, and that he would die before violating his religious beliefs. The bailiff warned Krupps that, if he did not stand when the judge entered the courtroom the next day, he would be held in contempt. Statement of Deputy Ben C. Collins (pages 1-2); Affidavit of Deputy Ben Collins, dated July 2, 1985 (pages 1-2); Affidavit of Harold Everett Skiles, Assistant Jefferson County District Attorney, dated July 1, 1985.

In his discussion with the bailiff, Krupps emphasized that, although his religious beliefs precluded him

from rising for a symbol of human authority, he meant no disrespect to the court.

The bailiff then relayed Krupps' comments and failure to stand to the judge who until then was unaware of Petitioners' failure to rise. Affidavit of Collins, *supra*; Affidavit of Donald J. Floyd, dated July 2, 1985 (pages 1-2).

On the next day, June 14, 1985, before trial, Judge Floyd met in chambers and talked with Petitioner Krupps who renewed his religious objection to rising for the judge. The judge urged him to stand or remain outside the courtroom until after the judge had entered. Krupps declined Judge Floyd's suggestion.

The record is very unclear as to whether the remaining six Petitioners ever received actual notice of their potential citation for criminal contempt.

On June 14, when Judge Floyd entered the courtroom, he observed that Petitioners did not stand and summarily sentenced them to thirty days in jail. All this happened outside the presence of the jury. *Cf.* Transcript of Trial Proceedings (June 14, 1985); Appendix B.

The record contains absolutely no suggestion that Petitioners' conduct was anything but peaceful, orderly, and otherwise respectful. Petitioners spoke no speech and took no action that would demonstrate either obstruction or inclination toward disruption of the judicial proceedings.

In fact, the record reflects the opposite. The record shows that the Port Neches municipal judge was able to proceed through trial without disruption by ignoring Petitioners' failure to rise and that later Judge

Floyd in fact conducted the first day of trial, the jury selection, without obstruction and had not noticed that Petitioners remained seated when he entered and left the room, until so informed by the bailiff.

The record indicates that, apart from declining to rise at the beginning and end, Petitioners otherwise participated in the trial to the extent called upon to do so.

The sincerity of Petitioners' religious beliefs was not disputed in the slightest by either of the Texas courts which considered their claims. As Petitioners' affidavits demonstrate, their refusal to rise rests upon strict, literal interpretation of various sections from at least twelve books of the Bible (such as Exodus, Daniel, Proverbs, and Corinthians, for example).

Petitioners sought a writ of habeas corpus below on three grounds: (1) that they were denied due process by being summarily convicted of contempt; (2) that there was no evidence to support their contempt convictions; and (3) that the First Amendment created an exemption to the rising requirement.

The Court of Criminal Appeals overruled each issue.

The Texas court acknowledged that it was applying a common law rule of criminal contempt, less limited than the federal contempt statute. Appendix A, pp. 11a-12a; 712 S.W.2d at 150.

With respect to the Free Exercise claim, the court's analysis is rather sparse, essentially failing to apply any of the Free Exercise tests developed by this Court and deciding that the burden on Petitioners' religious freedom was "self-imposed." Appendix A, page 13a; 712 S.W.2d at 151.

REASONS FOR GRANTING THE WRIT

The first substantive issue is whether the First Amendment guarantee of religious free exercise and protection from coerced symbolic speech can be denied in the peaceful context in which it arose.

One of the cornerstones that has made American society strong is its guarantee of religious diversity. The accommodation of religious belief not only reflects the tolerance of a strong democracy, but also provides the believers of a religious community with a tool with which to fashion and shape their identity and morality. The pragmatism of America society has lead it to adapt with the free exercise of religious belief and dissent and thus fashion a vital, long-standing society.

The imposition of a month-long jail term for exercising a very simple, peaceful, and not necessarily disrespectful religious tenet or symbolic gesture, that is, refusing to stand for another human being, clearly violates the First Amendment.

This case is important not only for the seven people (middle-aged parents) who face thirty days in an East Texas county jail because of their religious beliefs, but also for others who, for sincere reasons, feel compelled not to rise for a symbol of human authority, even though they otherwise peacefully comply with the requirements of judicial process.

Courts surely need to enforce order and decorum; but that authority is not without limit and is subject to the general restraint on governmental power found in the First Amendment.

The second issue is whether a trial judge, consistent with due process guarantees, can summarily imprison people for thirty days simply because they peacefully fail to rise.

I. THE FIRST AMENDMENT PROTECTS PETITIONERS FROM BEING JAILED FOR PEACEFULLY DECLINING TO RISE WHEN A JUDGE ENTERS OR LEAVES THE COURTROOM

A. Standards for Applying a Free Exercise Claim

The Texas Court of Criminal Appeals applied no recognized test in evaluating Petitioners' claim that their religious belief was burdened by the rising requirement.

Generally, this Court has applied a two-pronged test concerning the state's interest and the accommodation required.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707 (1981), the Court expressed the test as requiring the state to demonstrate that its challenged policy was "the least restrictive means of achieving some compelling state interest." *Thomas*, *supra*, at 718. *Sherbert*, *supra*, at 406-408. *Sherbert* and *Thomas* allowed claimants to receive unemployment benefits when their refusal to work was based on sincere religious beliefs.

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), formulated the test as: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Yoder* ruled that the Amish were exempt from a Wisconsin requirement that children attend school through age 16.

In *United States v. Lee*, 455 U.S. 252, 257-258 (1982), this Court held that Amish employers could not exempt themselves from the Social Security system on religious grounds, the test in that case being that the "state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *See also Gillette v. United States*, 401 U.S. 437 (1971) (conscientious-objector status only for those opposed to war generally).

As Justice O'Connor noted in *Goldman v. Weinberger*, 106 S.Ct. 1310, 1325 (1986) (dissenting), the tests, although not identical, are similar, comprising two consistent themes:

> First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated "compelling," "of the highest order," or "overriding." Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the "least restrictive" or "essential," or that the interest will not "be otherwise served."

B. Applying the Free Exercise Test

In this case, the Court of Criminal Appeals neglected to analyze either requirement in a coherent fashion.

First, the appellate court did not show that, whatever opposing interest the trial judge asserted, it was one of such compelling importance that it had to ov-

erride or prevail against Petitioners' sincere Free Exercise claim.

Nor did the Texas court show that the state's interest in this case would have been substantially harmed by granting a religious exemption from the rising requirement and that its interest could not otherwise be served in a less restrictive fashion. This second prong is required of the government because the Bill of Rights "is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state . . . ." *Goldman, supra.*

The record in this case does not show any breakdown of courtroom decorum. It does not show that Petitioners acted in any but a respectful manner (one can respectfully decline to rise for a judge); nor does it reflect any disorder, disturbance, or interruption of court business, or any malicious speech, antagonism, or belligerence either to the judge or to anyone else. In fact, the record shows the contrary; and it shows the depth and sincerity of Petitioners' religious beliefs.

The Court of Criminal Appeals did articulate two reasons to support the summary contempt convictions.

The Texas court decided that Petitioners' refusal to rise "disregard[ed] the formality and seriousness of a court's function, and directly conflict[ed] with the 'imperative need of the community in having an established forum in which controversies . . . may be decided in a calm, detached, neutral atmosphere.' " Appendix A, p. 12a; 712 S.W.2d at 150-151 (citation omitted).

The criminal appeals court decided that the mere failure to rise obstructed the proper administration of justice, even though the record shows absolutely nothing but a calm, detached, and neutral atmosphere. Indeed, the judge himself was not aware of Petitioners' declining to rise until so informed after the first day of trial.

A court does have the need to signal the beginning and end of its proceedings and to bring about quiet, but those interests do not satisfy the high standards established by this Court in Free Exercise claims. The rising requirement is itself not a "compelling" or "overriding" interest or one "of the highest order."

As to the second prong of the Free Exercise test, there are many ways of accommodating Petitioners' religious scruples with the court's legitimate interests. (The record shows that the court's interests were indeed served and unimpaired on the first day of trial, despite Petitioners' failure to rise)

As Presiding Judge Onion noted in his concurring vote to make up the majority below, the rising requirement is relatively new in Texas, less than 32 years old. For more than 118 years, Texas courts functioned well without the rising requirement.

There is no reason why a court cannot come to order while accommodating seven people whose sincere religious belief causes them to respectfully decline to stand.

Obviously, the bailiff intoning "the court is in session" or similar phrases signals a beginning to the proceedings and the need for quiet.

If Judge Floyd felt the need to offer an explanation so as preserve his authority, he could have simply advised others in the courtroom that Petitioners' religious belief caused them not to stand and that an important tenet the American system is to recognize and accommodate that belief. Such a statement to the others protects the dignity and integrity of the court, without infringing upon Free Exercise.

Solely advising Petitioners that they could stay outside the courtroom until the judge entered was an unsatisfactory attempt at accommodation: "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided . . . ." *Tinker v. Des Moines Independent Community School District* 393 U.S. 503, 513 (1969). *Cf. Abington School District v. Schempp*, 374 U.S. 203, 224-225 (1963) (rejecting argument that students could avoid mandatory school prayer by absenting themselves from classroom).

Besides, Petitioner Krupps, as a defendant, had a right to participate in the entire trial proceeding; he could not be compelled to yield one constitutional right in order to exercise another. *Cf. Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

The other six Petitioners would also have a First Amendment right to be present for the proceedings, particularly when they were there in support of Krupps and might even be witnesses for him and assist him, as they did on appeal, while proceeding *pro se* in his own defense. *Cf. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

As the dissent below noted, the municipal judge was able to accommodate the religious belief of

Petitioners without incident, simply by ignoring their refusal to stand. Appendix A, p. 21a; 712 S.W.2d at 155.

The mere act of rising is not the only index of respect. There are many other indicia, such as how one talks to the judge, the tone of voice, whether the person stands during other parts of proceedings, and so on. Nothing in the record shows that Petitioners were anything but respectful. In fact, their *pro se* pleadings all show utmost respect for the courts; and they just as strongly reflect Petitioners' religious beliefs.

Nor do the two Free Exercise cases which this Court decided last term compel a different result.

Goldman v. Weinberger, 106 S.Ct. 1310 (1986), upholding an Air Force regulation against wearing a yarmulke while on duty, was decided, over vigorous dissents, on the unique standards of deference given to military discipline under the Constitution.

Bowen v. Roy, 106 S.Ct. 2147 (1986), essentially held that, where public benefits were voluntarily sought, the government could dictate its own internal administrative procedures for such benefits by requiring use of Social Security numbers assigned by the government, despite Free Exercise claims. The two concurring Justices were troubled by the possible mootness of the case (*Id.* at 2159-2160, 2162-2164); and the three remaining Justices in the majority specifically noted, in Section III, that *Bowen* was not a case of "affirmatively compel[ling] appellees, by threat of sanctions, to refrain from religiously motivated conduct" and that the statute in question was of a "less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct

that has religious implications." *Id.* at 2154, citing, *inter alia, United States v. Lee, supra,* at 259, *Wisconsin v. Yoder, supra, Gillette v. United States, supra, West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), and *Jacobson v. Massachussetts,* 197 U.S. 11 (1905).

C. Petitioners Were Also Protected by the First Amendment from Compelled Symbolic Speech

Finally, we must consider, and disregard, the Texas court's attempt to distinguish the flag saluting exemption in *West Virginia Board of Education v. Barnette, supra,* from the rising requirement, as a "functional justification." Appendix A, p. 13a n. 10; 712 S.W.2d 151 n. 10.

Even though those objecting to mandatory flag saluting did so because of their belief as Jehovah's Witnesses (they, in fact, relied on some of the same passages of the Bible as do Petitioners here), *Barnette* did not turn on "particular religious views or the sincerity with which they are held" but focused first on the state's "power to make the salute a legal duty" because "many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual." *Supra,* at 634, 635, 634-635 (footnote omitted)

Justice Jackson's majority opinion for *Barnette* is one of the most poignant and poetic tributes to the exercise of dissent in a democracy, addressing not only objection to compelled saluting of the flag but also the philosophical roots of the First Amendment:

> . . . the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any ques-

tion in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual . . . .

. . . . . .

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniform and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee . . . .

. . . . . .

. . . To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind . . . .

. . . Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of

> assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Id. at 630, 632, 634.

Just as saluting a flag symbolizes "adherence to government as presently organized", so does the rising requirement compel "the individual to communicate by . . . sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights." *Id.* at 633 (footnote omitted).

An historical example of this compelled orthodoxy, Justice Jackson noted, was the punishment which the Quakers (and William Penn) suffered rather than uncover their heads in deference to civil authority. *Id.* n. 13.

The *Barnette* test for justifying government compulsion is also greater for the state than in the Free Exercise cases: "It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent." *Id.* at 633.

Surely, no "clear and present danger" emerged in this case to justify the trial judge's summary jailing of the seven people who refused to rise as a gesture of symbolic speech. *Cf. Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating as impermissible coerced speech the requirement of showing the New Hampshire state motto on auto license plates). *Cf. also* Dorsen and Friedman, *Disorder in the Court* (New York:

Pantheon Books, 1973), pp. 111-113 (an overview of law and a survey of judges showing that very few felt that contempt was appropriate even in cases of "passive disrespect").

Justice Stevens, then a Circuit Judge, dissenting in *In re Chase*, 468 F.2d 128 (7th Cir. 1972), viewed refusing to rise as protected by *Barnette*:

> I think the district court correctly described the real reason why courts generally command or request those present to stand when a session commences or concludes. Rising is a traditional demonstration of respect "for the courts which are a part of our whole system of government within this country." I share the district judge's respect for that tradition .... But if we recognize that tradition for what it is, we must also acknowledge that the sovereign's power to require its free citizens to perform symbolic acts of respect for authority is not unlimited.

Id. at 136-137 (footnote omitted).

The Fourth Circuit, in *United States v. Snider*, 502 F.2d 645 660 (4th Cir. 1974), also found difficulty in "distinguish[ing] the rising requirement from the flag salute," citing *Barnette, supra*, at 633 (footnote omitted). (The Circuit discussed in greater detail the citations of William Penn and William Mead for not removing their hats in court. *Id.* at 648 n. 7A ff).

II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROTECTS PETITONERS FROM BEING SUMMARILY JAILED FOR THIRTY DAYS

There are also significant substantive and procedural due process questions raised by the summary criminal contempt levied against Petitioners.

The substantive question is whether the thirty-day confinement assessed is cruel and unusual punishment under the facts of this case. *Cf. Bowers v. Hardwick*, 106 S.Ct. 2841, 2847 (1986) (Powell, J., concurring); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (two-prong test of "purposeless and needless imposition of pain and suffering" and "grossly out of proportion to the severity of the crime").

As to procedural due process, the record does not show that the other six Petitioners were admonished by the judge that they would be held in contempt if they did not rise. Only Krupps was so advised; and, since the judge held no contempt hearing, the record does not reflect that he knew whether Krupps had communicated that warning to the others. (Even were this Court not disposed to grant a writ, Petitioners would suggest that the judgment below should at least be vacated and the case remanded for an evidentiary hearing.)

There was no attorney present, or appointed, for Petitioners when they were held in contempt. Petitioners, proceeding *pro se*, should have been carefully warned of the seriousness of the situation, that they were about to be imprisoned, and given the chance to seek, or request, counsel.

Given the lack of hearing and counsel, the criminal penalty is shocking and unconscionably disproportionate. Confining people in jail for thirty days is surely excessive, especially when there was no disruption of court by Petitioners who were respectful and who otherwise participated in the trial proceedings.

This Court long ago recognized that summary contempt power is a significant departure from acceptable due process standards.

In re Oliver, 333 U.S. 257, 275 (1948), set out six criteria for those limited situations in which summary contempt may be invoked without running afoul of due process requirements:

> The narrow exception to these due process requirements includes only . . . misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

If any of the six "essential elements . . . are not personally observed by the judge . . . due process requires . . . that the accused be accorded notice and a fair hearing." *Id.* at 275-276, citing *Cooke v. United States*, 267 U.S. 517, 536 (1925). *Cf. Bloom v. Illinois*, 391 U.S. 194 (1968); *Taylor v. Hayes*, 418 U.S. 488, 497-500 (1974); *United States v. Wilson* 421 U.S. 309, 319 (1975), citing *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).

In this case, at least two of the essential criteria (disrupting the court's business and the need for im-

mediate punishment to prevent demoralization of authority) were clearly lacking.

Due process protections proscribe summary confinement without a hearing in situations where there is not "such an open, serious threat to orderly procedure that instant and summary punishment . . . was necessary." *Harris v. United States*, 382 U.S. 162, 165 (1965), citing *Cooke v. United States*, *supra*. *Cf.* Dorsen and Friedman, *supra*, at pages 232-238 ("The Summary Contempt Power").

At the very least, then, this Court should vacate the appellate judgment below and remand the case for a due process hearing.

The Court of Criminal Appeals' summary disposal of *In re McConnell*, 370 U.S. 230 (1962), as a construction of federal statutory contempt power, ignores the constitutional underpinnings which *McConnell* found in 18 U.S.C. § 401:

> . . . while this statute undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business, it also means that before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice . . . .
>
> "The exercise . . . of any broader contempt power than this . . . would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury."

In re McConnell, supra, at 234, citing *In re Michael,* 326 U.S. 224, 227 (1945); *Cf. Ex parte Hudgings,* 249 U.S. 378, 383 (1919); *Nye v. United States,* 313 U.S. 33, 53 (1980).

In re Oliver and *In re McConnell* and their underlying due process safeguards have been consistently observed by the Circuits.

Because the Texas Court of Criminal Appeals decision on this federal question conflicts with those of the different federal courts of appeals and of at least one state Supreme Court [Rules of the Supreme Court, Rule 17.1(b)], Petitioners would briefly point to the conflicting federal appellate decisions. Some of the cases concern the symbolic speech discussed in *Barnette*; and others, due process.

The Texas court's reliance on *Comstock v. United States,* 419 F.2d 1128 (9th Cir. 1969), would seem misplaced. There, the Circuit upheld a fifteen-day contempt sentence of the appellant who not only did not rise but refused to approach the bench when ordered by the judge, went limp after being led to the judge, and lay prostrate on the floor when addressed by the court. Petitioners did not engage in egregious behavior like Comstock's.

In re Chase, supra, is also quite distinguishable. Chase was found guilty of ninety-nine acts of contempt and assessed three days' confinement for each. His conduct and colloquies with the judge and his counsel about refusing to stand "interrupt[ed] the trial proceedings sufficiently to amount to obstructions of judicial administration." *Id.* at 129, 132.

The Seventh Circuit nevertheless refused to adopt a *per se* rule that simply refusing to rise constituted

contempt: "The contempt statute requires something more tangible, though not always physical, in the way of an obstruction." *Id.* at 133.

Justice Stevens, then a Circuit Judge, vigorously dissented in favor of a stronger rule:

> It does not follow . . . that if any individual were permitted to disobey the command to rise, a crack would form in the judicial edifice which would ultimately cause the entire structure to crumble. The edifice rests on a stronger foundation than its ceremonies; the real respect of the citizenry for the judiciary is earned, not commanded . . . .
>
> Insofar as the rising custom serves the purpose of marking the beginning or the end of a session, or of reminding those present to be quiet and to pay attention, it matters not one whit whether the defendant also rises . . . . The real question is whether his failure to perform the traditional symbolic gesture of respect for the court is such a distraction that the orderly conduct of the proceedings may be materially impaired. Unless the defendant's action—or . . . his inaction—constitutes a material "obstruction . . ." it is not punishable as criminal contempt.

Id. at 137-138 (dissenting) (footnotes omitted).

In the same way, *United States v. Snider*, *supra*, argues against the Texas court. There, the Fourth Circuit specially held "that the mere failure to rise . . . does not constitute criminal contempt. . . . To so hold will not, we think, tend to diminish respect for the judiciary and for the administration of justice." *Id.* at 660.

Although Snider's failure to stand was prompted by his religious faith, the Circuit did not rely on his Free Exercise claim, but treated the case as involving symbolic speech as in *Barnette*:

> . . . the custom of rising contributes to the functioning of the court by "marking the beginning and end of the session" and by "serv[ing] to remind all that attention must be concentrated upon the business before the court. . . ." But the words of the clerk or the judge may serve this function as well. The rising requirement seems to us not essential to the functioning of the court; as such, the failure to rise does not constitute a material obstruction. If the failure to rise . . . causes "a failure to become silent or focus attention on the business before the court" . . . the fault may better be resolved by compelling silence and attention than by coercing a gesture of respect.
>
> . . . . . .
>
> Never was [appellants'] conduct anything but quiet and respectful. Neither by word nor sign did they do anything "to obstruct the administration of justice"—except they would not stand. When ordered to do so, their response was a simple "I cannot, in good conscience, stand" or words of similar content.

Id. at 659 (citations omitted), 658.
(It is on the dissent in *Snider*, not the majority holding, that the Court of Criminal Appeals relies).

Three other cases deserve mention.

United States v. Abascal, 509 F.2d 752 (9th Cir.), *cert. denied*, 422 U.S. 1027 (1975), upheld a contempt

citation of a man who had remained slouched in his seat during proceedings, refused to rise at the end, and would not step forward when ordered by the judge. The Circuit only focused on Abascal's "disobedience," his refusal to step forward, as the contemptuous conduct. *Id.* at 756. The Circuit, moreover, faulted the lower court for ordering "immediate incarceration" when "[l]ess drastic alternatives were available." If there was to be incarceration, there should have been a due process hearing. Accordingly, the Circuit reduced the ninety-day sentence to the two weeks already served before appeal. *Id.* at 756, 757. *Cf. also United States v. Flynt,* 756 F.2d 1352, 1362 (9th Cir. 1985), citing *In re Gustafson,* 650 F.2d 1017, 1022 (9th Cir. 1981).

In *Commonwealth v. Cameron,* 462 A.2d 649 (Pa. 1983), the Pennsylvania Supreme Court, largely relying on federal precedents, reversed two criminal contempt convictions for refusing to rise because of religious reasons. *Cameron,* however, did not consider "the constitutional implications that may be raised by the assertion that appellant's actions were inspired by his religious beliefs" but simply held that a "refusal to rise, *without more,*" which "did not result in a significant disruption in the court proceedings," did not constitute criminal conduct. *Id.* at 652.

Finally, the Seventh Circuit has acknowledged that failure to rise, if done as "symbolic acts, when not coupled with further disturbance or disruption, sometimes might not rise to the level of an actual and material obstruction of the judicial process." *In re Dellinger,* 461 F.2d 389, 401 (7th Cir. 1972).

CONCLUSION

Whether the Court views this case as one concerning imprisonment for compelled free speech or for religious Free Exercise, or as the unjustified summary denial of due process, Petitioners' constitutional rights were clearly and impermissibly violated; and the Texas Court of Criminal Appeals erred grievously in upholding Petitioners' thirty-day jail sentence.

Barnette's admonition is a fitting close to this Petition:

> Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. . . . To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.
>
> The subject now before us exemplifies this principle.

West Virginia Board of Education v. Barnette, *supra*, at 636-637.

For all of these reasons, a Writ of Certiorari should be granted and this case should be set for argument. Alternatively, the judgment below should be vacated

and the case remanded for an evidentiary, due process hearing.

Dated: October 9, 1986.

Respectfully submitted,

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APPENDIX

APPENDIX A

EX PARTE CHARLES E. KRUPPS, HAROLD O. EDGINGTON, H.O. MATHEWS, VINCENT ROSE, LATTIE ROSE, ROSE HENLEY & JOHN HENLEY,

Applicants.

No. 69491.

Court of Criminal Appeals of Texas,
En Banc.

June 11, 1986

OPINION

W. C. DAVIS, Judge.

This is an original application for writ of habeas corpus in which seven applicants seek relief from a judgment holding them in contempt of County Court at Law No. 3 of Jefferson County. Applicants (Charles Edward Krupps, Harold O. Eddington, Howard D. Matthews, Sr., Vincent Rose, Lattie Jo Darby Rose, Rosie Henley, and John Ellis Henley) were summarily held in contempt of Respondent Donald J. Floyd on June 4, 1985 for "being disrespectful by failing to rise upon the entrance of the Court after being duly admonished and warned of consequences of their failure to do so." Applicants' punishment was fixed at thirty days confinement in the county jail.

Applicants urge three grounds for relief. First, applicants claim that the order of contempt is void because the trial court failed to provide them with due process. Second, applicants claim that there is no evidence which would support a contempt conviction. Third, applicants claim that the First Amendment's Free Exercise Clause creates an exemption to the "rising" requirement.

The record is presented to this Court largely in the form of affidavits. Although the use of affidavits presents this Court with the unusual circumstance of an informal record, such informality is not without precedent in a direct contempt. See *Ex parte Herring*, 438 S.W.2d 801, 803 (Tex. 1969); *Ex parte Hosken*, 480 S.W.2d 18, 22, n. 4 (Tex. Civ. App. - Beaumont 1972). As the Supreme Court has noted:

> "A contempt holding depends in a very special way on the setting, and such elusive factors as the tone of voice, the facial expressions, and the physical gestures of the contemnor; these cannot be dealt with except on full ventilation of the facts. Those present often have a totally different impression of the events from what would appear even in a faithful transcript of the record." *In re Little*, 404 U.S. 553, 556, 92 S.Ct. 659, 661, 30 L.Ed.2d 708 (1972) (Burger, C.J., concurring).

This is especially true where, as here, this Court must review the trial court's decision based on affidavits. Therefore, we review the affidavits with caution and restraint.

On June 13, 1985, Applicant Krupps appeared as a pro se defendant in County Court at Law No. 3 in Jefferson County before Respondent Judge Donald J. Floyd. The purpose of the appearance was to proceed upon a trial de novo from a conviction in Justice of the Peace Court for operating a motor vehicle without liability insurance. The other applicants had accompanied Krupps and were present as spectators. Upon completion of voir dire, court was recessed and the bailiff, Deputy Ben Collins, advised every one to rise. As Judge Floyd exited the courtroom, the bailiff noticed that the applicants did not stand. The bailiff advised the applicants that in the future they were to stand whenever a judge entered or exited a courtroom. The applicants responded that they would continue to remain seated. The bailiff notified Judge Floyd of the applicants' intentions. The trial remained recessed until the following morning.

On June 14, 1985, before court convened, Judge Floyd instructed applicants, through the bailiff, that they would be held in contempt if they continued to refuse to rise. Several spectators left the courtroom at this point, deciding to stay outside until after court had convened. However, applicants again informed the bailiff that they would not rise. The bailiff informed Judge Floyd that the applicants had indicated they would continue to refuse to rise upon entrance of the judge. Judge Floyd then had the bailiff bring Krupps to his chambers. In the presence of Deputy Collins, Deputy Pat Pilgrim and Judge Floyd, Krupps made it clear that he would continue to refuse to stand. He explained to the judge that, as a "follower of Christ," he could not rise upon the entrance or exit of a judge. Judge Floyd offered applicants, through Krupps, the alternative of remaining outside of the courtroom until court had convened.[1] Krupps again refused. Judge Floyd continued to advise Krupps that such a refusal was contemptuous. Krupps then returned to the courtroom.

When court convened, the bailiff advised everyone to rise. The applicants did not stand, and Judge Floyd held them in contempt of court.

Applicants initially argue that they were not accorded due process in their contempt adjudication. The due process required for a particular contempt adjudication depends upon the type of contempt which has occurred. Contempts in Texas are divided into two types: direct and constructive. 13 Tex.Jur.3d, *Contempt*, § 2, p. 183.

In *Ex parte Supercinski*, 561 S.W. 2d 482 (Tex.Cr.App.1977), this Court describes acts constituting

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[1] Judge Floyd stated in his affidavit:

I explained that I did not want to hold them in contempt and place them in jail so why couldn't they step outside until Court convenes and then return once the proceedings started. He stated they would not do that.

direct contempt as those in which the court knows all of the secondary facts. Direct contempt is further defined in Black's Law Dictionary as "[t]hose [acts] committed in the immediate view and presence of the court or so near the presence of the court as to obstruct or interrupt the due and orderly course of the proceedings." Black's Law Dictionary (Fifth Ed. 1983), 168.

Direct contempt adjudications satisfy the demands of due process through summary conviction and punishment without the need for prior notice or a hearing. *Ex parte Harvill*, 415 S.W.2d 174 (Tex.1967); *Ex parte Norton*, 144 Tex. 445, 191 S.W.2d 713 (1946). "Direct contemnors are not entitled to notice of the contempt charge or a hearing because there is no factual dispute arising from contemptuous behavior that occurs in the court's presence." *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979).

The United States Supreme Court has recognized the power of Texas courts to use summary procedures in cases involving direct contempt. *Fisher* v. *Pace*, 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569 (1949). In *Fisher*, supra 69 S.Ct. at 427, the Court reasoned:

> "Historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question. This attribute of courts is essential to preserve their authority and to prevent the administration of justice from falling into disrepute. Such summary conviction and punishment accords due process of law."

The Court, in a footnote, added that "[t]his rule is well established in Texas." Id., 69 S.Ct. at 427 n. 4.

Constructive contempt has been defined as relating to "acts which require testimony to establish their existence." *Ex parte Cooper*, 657 S.W.2d 435, 437 (Tex.Cr.App.1983). Constructive contempt is further defined in Black's Law

Dictionary as "[t]hose [acts] which arise from matters not occurring in or near the presence of the court, but which tend to obstruct or defeat the administration of justice, . . ." Black's Law Dictionary (Fifth Ed.1983), 167.

In *Cooper*, supra, the Court found the failure of an attorney to appear in court to be an example of constructive contempt. Such an occurrence constitutes an act which happened outside the presence of the court and upon which testimony will be required in order to discover the relevant facts.

Constructive contempt adjudications satisfy the demands of due process by requiring that the contemnor be given notice, a hearing and the opportunity to obtain an attorney. *Ex parte Hodge*, 389 S.W.2d 463 (Tex.1965); *Ex parte Flournoy*, 159 Tex. 425, 312 S.W.2d 488 (1958). These due process requirements are necessary because all of the elements of the offense are not personally observed by the court. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *Ex parte Pyle*, 134 Tex.148, 133 S.W.2d 565 (1939).

With this understanding of the due process differences in direct and constructive contempt adjudications, we now must determine whether the facts of the instant case warrant a direct or constructive contempt proceeding, or both.

In the instant case Bailiff Collins instructed the six applicants to rise. They refused to do so. Judge Floyd, through Bailiff Collins, instructed the six that, should they refuse to rise, they would be held in contempt. The affidavit of Bailiff Collins makes clear that the six applicants understood that the threat of contempt originated with Judge Floyd. Applicants again refused to rise. Bailiff Collins informed Judge Floyd that the applicants would refuse to rise upon his entrance into the courtroom. When Judge Floyd entered he saw that the applicants had not risen and held them in contempt.

Bailiff Collins, as an officer of the court,[2] admonished the applicants at the behest of Judge Floyd.[3] He made clear to the applicants that the admonition originated with Judge Floyd. The judge was advised that the applicants intended to refuse to rise when he entered. The applicants did in fact remain seated when Judge Floyd entered the courtroom and were consequently held in contempt and sentenced to thirty days in jail. Therefore, the admonishment was made in the presence of a court officer acting under direct instruction from the judge. The act which constituted the contempt, the applicants' failure to rise after being admonished, occurred in the presence of the judge. Thus, the entire act of contempt occurred in the presence of the court[4] making this direct contempt. Under these circumstances, the use of summary direct contempt proceedings were proper and did not violate applicants' due process rights.

Krupps, relying upon *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974) and *Ex parte Avila*, 659 S.W.2d 443, (Tex.Cr.App.1983), argues that this Court has extended the requirements of notice and hearing to

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[2] Article 36.24, V.A.C.C.P. reads in relevant part:

> The sheriff of the county shall furnish the court with a bailiff during the trial of any case to attend the wants of the jury and to act under the direction of the court.

[3] Black's Law Dictionary defines bailiff as:

> A court officer or attendant who has charge of the court session in the matter of keeping order, custody of the jury and custody of prisoners while in court.

See also *United States v. McCabe*, 129 Fed. 708 (1st Cir.1904); *People v. Robarge*, 41 Cal.2d 628, 262 P.2d 14 (concurring opinion).

[4] In *Ex parte Aldridge*, 169 Tex.Cr.R. 395, 334 S.W.2d 161, 165 (app.1959), this Court said:

> [t]he wording 'in the presence of the court' does not necessarily mean 'in the presence of the judge of the court. The court is present whenever any of its constituent parts are engaged in the prosecution of the business of the court . . .

direct contempt proceedings. Neither *Taylor* nor *Avila* supports such a conclusion.

In *Taylor*, supra, the Supreme Court reversed a direct contempt conviction of an attorney because the trial judge denied the attorney notice and a hearing, waiting until the conclusion of the trial for sentencing. The Court held:

> "This procedure does not square with the Due Process Clause of the Fourteenth Amendment. We are not concerned here with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him. [Citation omitted] The usual justification of necessity [citation omitted] is not nearly so cogent when final adjudication and sentence are postponed until after trial. [footnote omitted] Our decisions establish that summary punishment need not always be imposed during trial if it is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed until the conclusion of the proceedings. [citation omitted]" *Taylor*, supra, 94 S.Ct. at 2703-2704.

In the instant case, the trial judge adjudicated the contempt and sentenced applicants in one act. He did not postpone his sentencing until after Krupps' trial. In addition, the instant case did not involve the sensitive issue of an attorney being placed in the position of defending himself against a contempt charge while also attempting to defend his client in trial. The Court in *Taylor*, supra, did not expand the due process requirements in a direct contempt adjudication beyond the summary proceeding present in the instant case where the trial judge adjudicates the contempt and sentences a contemnor immediately.

In *Avila*, supra, the trial court held an attorney in constructive contempt without providing notice or hearing.

We held that such summary proceedings violated the specific statutory requirements of Art. 1911a § 2(c), V.A.C.S.[5] and the general due process required in constructive contempt adjudications. Id.

[2] The instant case is markedly different from *Avila*, supra, because, in the instant case, applicants were held in direct contempt. In addition, the contempt conviction in the instant case was not directed at an officer of the court; therefore, the broader due process requirements of Article 1911a, § 2(c), supra, are inapplicable. Both *Taylor*, supra, and *Avila*, supra, therefore, are distinguishable.

We find that, in applicants' adjudication, the trial court acted consistent with the due process required in a direct contempt proceeding.

Applicants also argue that a conviction for contemptuous conduct in Texas can only be upheld if the conduct "obstructs, or tends to obstruct, the proper administration of justice." *Ex parte Jacobs*, 664 S.W.2d 360 (Tex.Cr.App.1984); *Ex parte Salfen*, 618 S.W.2d 766 (1981). He then argues that the evidence in the instant case is insufficient to support a finding of contempt; therefore, the judgment of contempt is void. See *Deramus v. Thornton*, 160 Tex. 494, 333 S.W.2d 824, 830 (1960).

We noted earlier that contempts are classified as either direct or constructive when deciding the due process required in their adjudication. A similar decision is required when deciding what grounds for contempt are available to a court in a contempt adjudication.

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[5] In *Avila*, supra 659 S.W.2d at 445, we observed "that a common sense reading of Art. 1911a, Sec. 2(c), supra, requires, in essence, a trial de novo once its provisions have been invoked by a contemnor. That is, once the offended judge has made a determination that *an officer of the court* is in contempt of court, and the contemnor invokes his mandatory right to a hearing before another judge, the statute requires that the guilt or innocence shall be determined by a judge other than the offended judge."

Contempts are either criminal or civil in nature. 13 Tex. Jur., *Contempt*, § 3, p. 186; 17 C.J.S., *Contempt*, § 5(2), p. 12. Criminal contempt results from doing that which the court has prohibited; civil contempt generally results from failing to follow an order of the court. *Texas Pet Foods Inc. v. State*, 529 S.W.2d 820 (Tex. Civ. App. - Waco 1975), writ ref'd n.r.e. In addition, a proceeding which has as its purpose to punish a contemnor through fine or imprisonment is classified as criminal; the contempt is considered civil if the purpose of the sentence is coercive or remedial. Id.

[3] In the instant case, Judge Floyd clearly held applicants in contempt for conduct which was prohibited. The sentence of thirty days in jail had as its purpose to punish applicants for refusing to stand. The contempt proceeding, therefore, was criminal in nature.

Common law criminal contempt is not restricted only to conduct that obstructs, or tends to obstruct, the proper administration of justice.[6] "[C]riminal contempts are all those acts in disrespect of the court, or of its process, or which obstruct the administration of justice, or tend to bring the court into disrespect, etc." *Ex parte Robertson*, 27 Tex.App. 628, 11 S.W. 669 (1889). "Generally speaking, he whose conduct tends to bring the authority and administration of the law into disrespect or disregard, interferes with or prejudices parties or their witnesses during a litigation, or otherwise tends to impede, embarrass, or ob-

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[6] The only Texas statute relevant to direct criminal contempt provides:

> "A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including the authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control proceedings that justice is done. A court has the power to punish for contempt." V.A.C.S., art. 1911a, §1(a).

struct the court in discharge of its duties is guilty of contempt." *Ex parte Norton*. 144 Tex. 445. 191 S.W.2d 713, 714 (Tex.1946), quoting 12 Amer.Jur., *Contempt*, § 2, p. 389. See also 13 Tex.Jur.3d, *Contempt*, § 3, p. 187.

While these notions are stated broadly, they can be broken into two specific acts: 1) an act which is disrespectful of the court and 2) an act which obstructs, or tends to obstruct, the proper administration of justice. In *Salfen*, supra, and *Jacobs*, supra, we noted the importance of the second type of act as a ground for contempt. However, this Court has never excluded disrespectful conduct from the common law, as a ground for contempt. With this in mind, we will now determine whether refusing to rise when a judge enters a courtroom is conduct which can be found contemptuous under common law.

We can find no Texas case which deals with the question of whether refusal to rise when a judge enters the courtroom is contemptuous conduct. In the Federal judiciary, one federal circuit court has held that refusal to rise following a trial court's insistence that a contemnor comply with the "rising requirement is sufficiently related to maintaining order in the actual presence of the court that an infraction can be dealt with summarily. . . .' " *In re Chase*, 468 F.2d 128, 132 (7th Cir.1972), quoting *United States ex rel Robson v. Malone*, 412 F.2d 848, 850 (7th Cir.1969). Cf. *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974); *Com. v. Cameron*, 501 Pa. 572, 462 A.2d 649 (1983). Although distinguishable, see also *United States v. Abascal*, 509 F.2d 752 (9th Cir. 1975); *Comstock v. United States*, 419 F.2d 1128 (9th Cir. 1969).

In *Chase*, supra, the defendant, along with ten co-defendants, was tried on numerous federal charges. At the start of the trial, the defendant refused to stand when the trial judge entered the courtroom. He continued to refuse to stand throughout the trial, despite repeated admonishments and warnings by the court. The trial court found

defendant in contempt of court on 99 separate occasions. In upholding the contempt convictions, the circuit court stated:

> "As we pointed out, 'the traditional rising in unison of persons present in a court can reasonably be thought to contribute to the functioning of the court. It is a way of marking the beginning and end of the session, and probably serves to remind all that attention must be concentrated upon the business before the court, the judge's control of the court room must be maintained with as little burden on him as possible, and there must be silence, except as the orderly conduct of business calls for speech.' " *Chase*, supra, at 132, quoting *Malone*, supra, at 848.

[4, 5] It is important to note that *Chase*, supra, involved the more restrictive statutory contempt power of federal courts.[7] "Congress has limited the summary contempt power vested in [federal] courts to the least possible power adequate to prevent *actual obstruction of justice.*" *In re McConnell*, 370 U.S. 230, 235, 236, 82 S.Ct. 1288, 1292, 8 L.Ed. 2d 434 (1962). Contempt powers of Texas courts are not similarly restricted. Therefore, contemptuous conduct under federal law has only limited applicability in Texas.[8] Common law allows a conviction for contempt un-

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[7] The federal contempt statute relevant in *Chase*, supra at 132 n. 4, provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at this discretion, such contempt of its authority, and none other, as—
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> (1) Misbehavior of any person in its presence or so near thereto, as to obstruct the administration of justice." 18 U.S.C. § 401(1).

[8] The difference in federal and state law provides a critical distinction between our holding in the instant case and the holding in *Snider*, supra. The court in *Snider*, supra, reached the opposite conclusion of the court in *Chase*, supra, but both were interpreting the same federal statute. Therefore, as the Justice Widener noted, "[s]ince [this court's

der the broader notion of disrespect as well as obstruction, or tendency to obstruct, the proper administration of justice.[9] Unlike federal law, or our law has not required that an actual obstruction of justice be present.

[6] With these differences in contempt law in mind, we find the circuit court's opinion in *Chase*, supra, persuasive. A direct refusal to rise upon the judge's entrance interrupts the normal proceedings of the court, disregards the formality and seriousness of a court's function, and directly conflicts with the "imperative need of the community in having an established forum in which controversies between man and man and citizen and sovereign may be decided in a calm, detached, neutral atmosphere." *Snider*, supra at 665 (Widener, J. dissenting). See also, *Cameron*, *supra* 462 A.2d at 652-653 (McDermott, J., dissenting). Therefore, we find that a refusal to rise after being admonished of the rising requirement constitutes an act of disrespect toward the court and an act which obstructs the proper administration of justice.

In the instant case, Judge Floyd found that applicants' refusal to rise was an act of disrespect toward the court. Judge Floyd confronted Krupps in chambers and admonished him that he was required to rise upon entrance of the judge into the court. Applicants ignored Judge Floyd's warning and intentionally refused to rise upon entrance of the judge into the court. These facts prove beyond a reasonable doubt Judge Floyd's conclusion that applicants were in contempt of court.

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ruling] is not based on federal constitutional grounds, it need have no effect upon the various States in the Circuit." *Snider*, supra at 665. The same reasoning applies for distinguishing *Cameron*, supra, because the Pennsylvania contempt statute mirrors the federal contempt statute.

[9] Lacking any specific statute we will follow the common law of England provided it is not inconsistent with the Constitution or laws of this State. V.A.C.S., Art. 1.

Applicants finally argue that the rising requirement unconstitutionally burdens their religious beliefs. They rely upon *West Virginia v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), for the argument that this Court should recognize a religious exception to the rising requirement. In *Barnette*, supra, the Supreme Court held that, in limited circumstances, a sincere religious belief can create an exception to the practice of saluting the flag.[10]

[7] However, it is unnecessary for this Court to decide whether the First Amendment requires such an exception. Even if the rising requirement created a burden on applicants' religious freedom, Judge Floyd removed the burden by giving them the option of remaining outside until after court convened. Applicants mooted whatever First Amendment claim that he might have had when they rejected that alternative. Any burden on their religious freedom at that point was self-imposed. Judge Floyd did not demand that they remain in the court and comply with the rising requirement. Instead, showing admirable restraint, Judge Floyd gave them a choice, and they decided to remain. Once applicants chose to remain and refused to rise, it became difficult to understand what religious tenet was being expressed.

Accordingly, the relief requested is denied.

McCORMICK and WHITE, JJ., concur in the result.

ONION, Presiding Judge, concurring.

This Court should not have, contrary to longstanding policy, granted leave to file this application for writ of habeas corpus seeking to invoke its original jurisdiction.

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[10] We note that the court in *Chase*, supra, commented that "[t]he functional justification for the judge's entitlement to require rising, unlike, perhaps, the flag salute, is not something completely devoid of functional significance and solely designed to signify a certain set of beliefs."

Of course the Court of Criminal Appeals has the power to issue the writ of habeas corpus, subject to such regulations as may be prescribed by law. Article V, § 5, Texas Constitution; Article 11.05, V.A.C.C.P. The Court has general and unlimited jurisdiction to issue original writs of habeas corpus in all cases, including those of a civil nature. *Ex parte Japan,* 36 Tex.Cr.R. 482, 38 S.W. 43 (App.1896); *Ex parte Norvell,* 528 S.W.2d 129 (Tex.Cr.App. 1975); *Ex parte Powell,* 558 S.W.2d 480 (Tex.Cr.App. 1977). "However, it is the policy of the court of criminal appeals not to entertain jurisdiction to grant original writs of habeas corpus, except in extraordinary cases . . . the court of criminal appeals will not issue original writs of habeas corpus in cases where other courts have jurisdiction to do so. For example, the court of criminal appeals will not exercise its original habeas corpus jurisdiction in attacks on the validity of a misdemeanor conviction, since the county courts and district courts and judges thereof have jurisdiction to grant such relief and an appeal lies from any such court's order denying relief." 38 Tex.Jur.3rd, Extraordinary Writs, § 62, pp. 124-126, and cases there cited.

In *Ex parte Fitzpatrick,* 167 Tex.Cr.R. 376, 320 S.W.2d 683 (App. 1959), it was held that while the Court of Criminal Appeals has original jurisdiction to grant writs of habeas corpus it will do so only when relator has been unsuccessful in obtaining relief from trial court having similar jurisdiction.

This Court does not take testimony. *Ex parte Rodriguez,* 169 Tex.Cr.R. 367, 334 S.W.2d 294 (App. 1960). All we have before this Court as to what happened in County Court at Law No. 3 of Jefferson County are "statements" of applicants attached to the pleadings and affidavits from the respondent judge, bailiff, etc., filed with the response requested by this Court. Upon these conflicting versions this Court tries, though badly divided, to write on the proper law applicable.

I would deny the application for writ of habeas corpus seeking to invoke involving our original jurisdiction without prejudice to the applicants seeking habeas corpus relief from a trial court where the witnesses can be subjected to examination, direct and cross, and the facts fully developed. If the applicants do not get the relief requested an appeal lies therefrom. The applicants have other remedies without this court of last resort getting involved in every case of contempt in every court in this state.

This Court should not abandon its longstanding policy of exercising its original habeas corpus jurisdiction with care in cases where other courts have habeas corpus jurisdiction and where the facts may be properly and fully developed before a decision on the law is made. And this is particularly true if the case is one of first impression in Texas as Judge Clinton states.

Apparently neither the majority nor the dissenters agree. Since the matter is going to be decided upon "statements"[11] and affidavits, then I would join the well written opinion of Judge W.C. Davis. From the meager evidence it is apparent the applicants came ready for confrontation. What occurred was contempt, direct contempt and nothing but direct contempt. In my opinion, to suggest the same was constructive contempt is absurd.

What Justice McDermott of the Pennsylvania Supreme Court wrote in his dissenting opinion in *Commonwealth v. Cameron*, 501 Pa. 572, 462 A.2d 649, 38 A.L.R.4th 555 (1983), is here pertinent.

> "The rising in unison is not a token of respect for the person of the judge. For all, including the judge, stand. The ceremony is simply an admonition to put aside all other matters and direct and center attention

[11] The applicants' statements as to what occurred are not sworn to by them. Each states he does not take oaths. Most conclude "I will let my Yea be Yea and my Nea be Nea as is written."

to the business before the court. It separates the corridor from the courtroom, giving notice that the record is open and no distractions from the defendant's business can be allowed. Analyzed to its clearest purpose, it is the authority of the court being exercised in the interest of the concentration and attention to which the defendant's business is entitled. No one, including the defendant, should be allowed to alter or dilute that purpose.

"I have said that the refusal to stand when court is convened is both an abuse of process and an obstruction. It is an abuse of process because it allows a statement to be made to the court, jury, and other parties, before any statement is allowed by the rules. The statement may indeed be more forceful by action than words. It does not matter what is intended by the action. It may be threat, warning, or absurdity. Whatever is intended, it is out of order and, for whatever it is worth, it is done for an advantage that cannot be answered.

"Refusal to stand, or refusal to sit, is also an obstruction to orderly process, for it is intended, and does in fact, defeat the purpose of concentration and attention by rendering the defendant's person the cynosure of all present, if only because he is out of order. When one is permitted to make statements by word or action, not permitted by the rules, all present lose their commitment to the need for quiet and order. Indeed, some are frightened. Not always an unintended side effect.

"The majority undertakes a careful analysis of the criminal contempt statute. They err, however, in concluding that conduct such as this does not obstruct the proceedings. It is an obstruction; of a silent, passive nature, doubtless, but a powerful, undeniable pernicious obstruction nonetheless."

I fully agree with Justice McDermott. When this writer commenced his judicial career almost 32 years ago, there was no formal commencement of a trial court session, no traditional rising in unison of persons present in a court. All that came a few years later in Texas. There can be no doubt that rising in unison of persons present contributes to the functioning of the court. It marks the beginning and ending of each session and serves to remind all that attention must be concerned upon the business before the court. The judge's control of the courtroom must be maintained with as little burden on him as possible. The rising requirement serves both substantive and procedural interests and constitutes an integral part of the judicial process. Persons do not rise in respect of the judge, a temporary office holder, but in respect of the governmental institution, the court.

Although I would deny the applications without prejudice as stated, I would concur in the action taken.

CLINTON, Judge, dissenting.

Since they are unique the problems in this cause may not be resolved routinely by trying to find the right light of classification of kind and nature of contempt to focus on the several scenarios that one or more applicants played out an afternoon and some again the following morning. The notion seems to be that once the proper light is turned on given active and passive conduct, one will know he is seeing a particular type of contumacious conduct and then is enabled to critique it according to its narrow contextual classification and surrounding traditional trappings. Sometimes, however, a problem defies classification by label, and thus may not be resolved by rote. Of first impression in Texas, this cause surely presents just such an occasion.

At the threshold it is observed that although some applicants did not rise when respondent judge left the courtroom the first afternoon, that particular "act" is not in

issue here, for the judge did not remotely suggest that any applicant was held in contempt for that behavior. Thus, we are not presented with the bare question of whether just an "act" of not rising when a bailiff intones "all rise" is in itself "an affront to the dignity of the court or disruptive conduct in the courtroom," *Ex parte Gordon*, 584 S.W.2d, 686, 688 (Tex.1979).

Here, however, the initial failure to rise triggered what followed, commencing with a prompt admonition from the bailiff, response of some applicants and the bailiff's reporting those developments to respondent judge. Thus the stage was set for the players, but a script had not yet been written. And from the record before this Court we are unable to identify all the players, to determine their respective role or how each played his own. There are serious factual conflicts and some sensitive matters lurking about in this particular cause—not the least of which is an asserted religious belief.

Nevertheless, unless performing an act of respect to the court is to be at will of every person in the courtroom according to his own lights, this Court must require of applicants that which we demand in our own courtroom or recognize a justification for not rising the next morning.

Since the statutes do not define contempt of court, except in certain instances, Texas courts are relegated to the common law in determining meaning, scope and extent of the doctrine, in the light of our constitutional safeguards and the spirit and genius of our institutions. As pertinent here, one is guilty of contempt when one's conduct is an affront to the dignity of the court or is disruptive in the courtroom, *Ex parte Gordon*, supra; *Ex parte Landry*, 65 Tex.Cr.R. 440, 144 S.W. 962 (1912); *Ex parte, Wolters*, 64 Tex.Cr. R. 238, 144 S.W. 531 (1911), or "tends to bring the authority and administration of the law into disrespect or disregard . . . or to impede, embarrass, or obstruct the court in the discharge of its duties." 13 Tex.Jur.3rd 182,

Contempt § 1; *Ex parte Norton*, 144 Tex. 445, 191 S.W.2d 713, 714 (1946).

Article 1911a, V.A.C.S., provides that a court "has the duty to require that proceedings shall be conducted with dignity . . ." Under a statute granting power to punish for contempt "misbehavior [that] obstruct[s] the administration of justice," Federal courts have found that because "the traditional rising in unison of persons present in a court can reasonably be thought to contribute to the functioning of the court . . ., the court may require such rising, in the interest of facilitating its functions" and, therefore, may enforce that requirement—though against a claim of religious freedom vouchsafed by the First Amendment they lack unanimity. *United States ex rel. Robson v. Malone*, 412 F.2d 848, 850 (CA7 1969); *In re Chase*, 468 F.2d 128, 133 (CA7 1972); see *United States v. Seale*, 461 F.2d 345, 371 (CA7 1972) and *Comstock v. United States*, 419 F.2d 1128 (CA9 1969). Contra: *United States v. Snider*, 502 F.2d 645, 657-660 (CA4 1974); see also *In re Dellinger*, 461 F.2d 389, 401 (CA7 1972).

Pointing out that acts of applicants occurred in the presence of the court, respondent judge argues from *Ex parte Norton*, 610 S.W.2d 512, 513 (Tex.Cr.App. 1981) and *Ex parte Supercinski*, 561 S.W.2d 482, 483 (Tex.Cr.App. 1977), that he was empowered summarily and without a hearing to hold applicants in contempt. The rationale is that since the court sees or hears actual misbehavior in the courtroom the judge "knows of all the facts which constitute the contempt," *Supercinski*, supra; *Ex parte Ratliff*, 117 Tex. 325, 3 S.W.2d 406 (1928).

Although in his brief respondent judge insists that "in the direct contempt proceedings before [him], no such constitutional rights were asserted," p. 7, "in a reasonable and intelligent manner," p. 9, the majority has found otherwise; it says that he "offered applicants, through Krupp, the alternative of remaining outside the courtroom until

court had convened." But Judge Campbell correctly points out, "The record is silent as to whether Krupps conveyed any message from the judge to any of the other six applicants."

Ordinarily purpose or intent is irrelevant in determining whether an offensive act is contemptuous; the nature of the act itself is determinative. 13 Tex.Jur.3rd 182, Contempt § 1. The judge may convict and punish summarily on his own personal knowledge and observations taking into consideration "all the circumstances of aggravation, provocation, or mitigation," 13 Tex.Jur.3rd 248, Contempt § 50. However, where—as the majority has found here—a judge is aware that an alleged contemnor claims his quiet and peaceful behavior is protected by the First Amendment or Article I, § 6 of our Bill of Rights, the court does *not* "know of all the facts." Requisites of due process and due course of law dictate a hearing be held to determine whether that claim is founded on a sincerely held religious belief, and to what extent it may excuse otherwise contemptuous behavior or mitigate against punishment. See *United States v. Snider*, supra, 502 F.2d at 657-658.[12]

Accordingly, I would vacate the commitment orders without prejudice to respondent's holding a proper hearing should he be advised to pursue the matter of contempt.

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[12] Holding such a hearing might then present "a very serious constitutional question . . . not unlike that in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)," viz:

"It is not easy to distinguish the rising requirement from the flag salute. Both seem to require affirmation, if not a belief, at least of 'an attitude of mind.' 319 U.S. at 633, 63 S.Ct. [at 1183]"

Snider supra, at 660. That the majority may find it "difficult to understand what religious tenet was being expressed" when applicants "chose to remain and refused to rise" will not justify a denial of due process and due course of law by refusing each an opportunity to explain "an attitude of mind," *Ibid.*

TEAGUE, Judge, dissenting.

I first point out that this is not an active disorderly trial or courtroom case, as the majority opinion implicitly tries to make it out to be. It is instead a passive disrespectful courtroom case in which several persons refused to adhere to the ancient, traditional, ceremonial, or symbolic act of persons in a courtroom rising or standing in unison upon command of the court bailiff at the commencement of the court session. I further point out that my research reflects that dignity and decorum in a courtroom are not achieved, nor do they turn on, whether a defendant, a spectator, or a witness refuses to stand or rise or does not refuse to rise or stand in a courtroom when commanded to do so. Given the facts and circumstances of this cause, there is, very simply, insufficient reason to invoke in this cause the awesome power of direct contempt to cope with the petty form of disrespect that the applicants exhibited in the trial court. See Dorsen and Friedman, *Disorder in the Courtroom: Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct* (Pantheon Books, 1973 edition), at page 113.

Concerning the applicants' refusal to rise or stand, I am in agreement with the approach that the Justice of the Peace in this cause took when the applicant Krupps' criminal case, *for operating a motor vehicle without liability insurance*, was pending in that court. I believe, as the record reflects or indicates that the Justice of the Peace apparently believed, that this kind of problem is best handled much in the same way as you deal with young children. There are just a lot of things you don't see. In that kind of situation, I believe that it is just better that one not see it. It is obvious to me that the applicants in this cause, for whatever reason, are seeking attention, much like a young child craves attention. Given the facts and circumstances of this cause, I, for one, would not give the applicants the attention they seek, by putting this

Court's seal of approval on their contempt convictions—let them go elsewhere, if they can, to get their attention.

Those who join the majority opinion, however, do not subscribe to my kind of thinking, but trudge onward and try to give legal reasons why the applicants' convictions for direct contempt of court must be sustained. The majority opinion totally fails to justify sustaining the contempt orders of the trial court. Therefore, I must, like Judge Campbell has done, see the dissenting opinion that he has filed in this cause, because the majority opinion presents such an inviting target, dust off my hunting license and don one of those marvelous British safari hats for the occasion, and a hunting I shall go.

Because of one of the issues in this cause, Ben Milam of Texas history fame's declaration that "Texans do not stand for any man, but *only* for their God" is applicable to this cause. What Henry Thoreau declared in *A Week on the Concord and Merrimack Rivers*, which I have carefully reworded to fit this cause, "All men are partially buried in the grave of custom, and of some we see only the crown of their heads and the robes that they wear," may also be applicable to this cause.

The record reflects that Charles Edward Krupps and six other persons were held in direct contempt of court by Hon. Donald J. Floyd, the duly elected judge of County Court at Law No. 3 of Jefferson County, *only* because they did not rise or stand when ordered to do so after Judge Floyd entered his courtroom on the day in question. Judge Floyd assessed punishment for each person at 30 days' confinement in the Jefferson County Jail. The majority opinion affirms the orders of contempt. I respectfully dissent to such decision.

In dissenting, I first point out that there is not a scintilla of evidence in the record before us that would indicate or reflect that the applicants' act of not rising or standing

was accompanied by any disorder, disturbance, or interruption of the court's business. At no time did any of the applicants ever speak maliciously, antagonistically, or belligerently either to Judge Floyd or his bailiff, or anyone else for that matter, either inside or outside of the courtroom. Notwithstanding these facts, a majority of this Court sustains Judge Floyd's orders of contempt. I suppose it does so on the feeble reasoning that not to uphold Judge Floyd's orders would somehow destroy order in all of our courtrooms, which argument I find closely resembles the one that if a trial judge does not wear a robe when he is on the bench he will not get the respect and attention of those in attendance, and chaos will then reign in our courtrooms. And Judge Pete, we all know that the latter is a bunch of poppeycock, don't we?

I believe that if one will carefully give the ancient subject of rising and standing in the courtroom, which my research has yet to reveal its real source, a little thought, he will conclude, as I have done, that the ancient, traditional, ceremonial, or symbolic act of persons in a courtroom rising or standing in unison upon command of the court bailiff, or some other person who is directed by the judge to give the command, is not necessary to the carrying out of the court's business in an orderly fashion.[13]

The usual reasons given why persons must rise or stand after a trial judge or an appellate court judge enters his

[13] In the concurring opinion that Presiding Judge Onion has filed in this cause, he states that "When this writer commenced his judicial career almost 32 years ago, there was no formal commencement of a trial court session, no traditional rising in unison of persons present in court. All that came later in Texas." If rising or standing in unison of persons in a courtroom is so extremely important to preserve our court system, then I must ask the following questions: In the preceeding 118 years, how on earth did our courts manage to function without persons in the courtroom not rising or standing upon command? Does this mean that from 1836 until 1954, for 118 years, we were a civilized society, and not a barbaric society which the majority opinion implies that we are today?

courtroom are the following: It is a way of marking the beginning of the court's session; it probably serves to remind all that attention must be concentrated upon the business before the court; it reminds those present that the judge's control of the courtroom must be maintained at all times with as little burden on the judge as possible; and it probably instructs all persons present that there must be silence, except as the orderly conduct of business calls for speech. See *U.S. ex rel. Robson v. Malone*, 412 F.2d 848, 850 (7th Cir.1969). If there was no other way than to require those in the courtroom to rise or stand in unison upon command in order to accomplish the court's orderly conduct of its business, I might agree with the majority opinion. However, there is another and very simple way to accomplish the above objectives.

If the per se act of refusing to stand or rise in a courtroom actually obstructs or tends to obstruct the proper administration of justice, constitutes disrespect for the court, or its process, interrupts the normal proceedings of the court, causes the formality and seriousness of the court's business to be disregarded, and directly conflicts with the "imperative need of the community in having an established forum in which controversies between man and man and citizen and sovereign may be decided in a calm, detached, neutral atmosphere," as the majority claims, I must ask the author of the majority opinion, and those who join his opinion, whether they have actually ever been in a courtroom filled with persons, where the bailiff declares in a rather loud voice, "All rise," with the trial judge then ascending the bench, and thereafter the courtroom sounding much like a stampeding herd of cattle? And, after the bailiff declares in another rather loud voice, "All please sit," the courtroom's sound repeats itself? Having witnessed such sights many times in my legal career, in both rural and urban courtrooms, I must state that if the per se act of failing to rise or stand upon command constitutes an obstruction of the proper administration of

justice, the rising or standing in unison by persons in the courtroom, upon the command of the bailiff or some other authorized person, equally constitutes an obstruction of the proper administration of justice. The majority opinion's dog might have been a good hunting dog many years ago, but I find that today, if one carefully examines him, he will easily find that the dog has gotten too old and will no longer hunt as he once did.

If one also places the majority opinion under the microscope, in order to find valid reasons that might justify its holding that the applicants are guilty of direct or criminal contempt of court, he will not find any valid reasons therein why the mere act of the applicants refusal to stand or rise "interrupted the normal proceedings of the formality and seriousness of the court's function"; or that their mere act of not standing or rising "directly conflicted with the imperative need of the community in having an established forum in which controversies between man and man and citizen and sovereign may be decided in a calm, detached, neutral atmosphere."

The majority opinion also makes the ludicrous statement that if the rising or standing requirement that was imposed in this cause created a burden on Krupps' religious beliefs, that burden was removed when Judge Floyd gave him the option of remaining outside the courtroom until after court convened. Would this Court hold that a state statute which authorizes a minute "for meditation or voluntary prayer" in public schools would be a valid statute provided that the statute also contained a provision that those persons who did not wish or desire to participate were given the option of leaving the classroom? Cf. *Wallace v. Jaffree*, _ U.S.___, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). Would this Court uphold a law that made it mandatory that a person in attendance at a public school must salute the American flag if the statute also contained a provision that those persons who did not wish or desire to salute the flag were

given the option of leaving? Cf. *West Virginia v. Barnett*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). I do not believe that even the present United States Supreme Court would sustain these kinds of state statutes.

In holding that if the rising or standing requirement created a burden on the religious beliefs and freedoms of the applicant Krupps, because he was a party litigant in court that day, the majority opinion overlooks the fact that the Constitutional right to a public trial does not mean one in which a party litigant is permitted to be present in the courtroom part of the time, but not all of the time, as the majority opinion implicitly holds; he is entitled to be present all of the time—provided he behaves himself. Cf. *Allen v. Illinois*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Also see Antieau, Vol. 1, *Modern Constitutional Law*, Section 5:57. I emphasize the fact there is not a scintilla of evidence that the applicant Krupps ever misbehaved when he was in Judge Floyd's courtroom.

Futhermore, the record is totally absent of any evidence that any applicant made or attempted to make Judge Floyd's courtroom a forum or circus in order to make their religious beliefs known, or to solicit converts, nor is there any evidence that any applicant ever caused any actual interruption, interference, or obstruction of the judicial process or the operation of Judge Floyd's courtroom.

Trial judges do not have the untrammeled discretion to punish every act that they might find to be personally offensive as a criminal contempt. Futhermore, summary contempt procedure is to be invoked and applied only as a last resort. *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974); *In re Oliver*, 333, U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985); *In re Gustafson*, 650 F.2d 1017 (9th Cir. 1981); *Ex parte Elmore*, 161 Tex. 585, 342 S.W.2d 558 (Tex.Sup.Ct. 1961).

The use of the summary contempt power by a trial judge must be consistent with the reasons for criminal or direct contempt, and the bare fact that an individual's behavior might be offensive to a particular trial judge's personal sensibilities does not necessarily render it contumacious behavior. See *Brown v. United States*, 356 U.S. 148, 153, 78 S.Ct. 622, 625, 2 L.Ed.2d 589 (1958).

I return to the question that Judge Campbell in the dissenting opinion that he has filed in this cause partly answers as to the applicants except Krupps, whether the applicants' conduct in intentionally or knowingly failing or refusing to rise or stand when Judge Floyd entered his courtroom is sufficient *without more* to sustain a direct or criminal contempt conviction?

Notwithstanding my views toward the ancient, traditional, ceremonial, or symbolic act of persons in a courtroom rising or standing in unison upon command of the court bailiff, or some other authorized person, at the commencement of the court session, before the power of summary contempt may be invoked and applied it is universally held that the conduct *must* interfere with and disrupt the orderly process of a court before it will constitute direct contempt.

The majority opinion states that it finds the Federal Seventh Circuit Court of Appeals' opinion of *In re Chase*, 468 F.2d 128 (7th Cir. 1972), "persuasive." Although a number of federal courts have determined that under the federal statutory counterpart to our contempt statute, the rising or standing requirement may be enforced with criminal contempt, they also hold that *this kind of contempt power may be exercised only when the failure or refusal to rise or stand is accompanied by a disruption of the proceedings*. See, for example, *United States v. Wilson*, 421 U.S. 309, 95 S.Ct. 1802, 44 L.Ed.2d 186 (1975); *United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985); *In re Chase*, supra; *United States v. Abascal*, 509 F.2d 752 (9th Cir.

1975), cert. denied 422 U.S. 1027, 95 S.Ct. 2621, 45 L.Ed.2d 684 (1975); *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972); *United States ex rel Robson v. Malone*, 412 F.2d 848 (7th Cir. 1969); *Comstock v. United States*, 419 F.2d 1128 (9th Cir. 1969). Also see *Commonwealth v. Reid*, 494 Pa. 201, 431 A.2d 218 (1981).

In finding that *In re Chase*, supra, is "persuasive" authority to sustain the contempt convictions of the applicants, the majority opinion overlooks the fact that the Seventh Circuit in *Chase*, supra, rejected out of hand the government's argument that the failure to rise or stand *in itself* created a per se obstruction of judicial administration punishable by criminal contempt. In affirming the defendant's contempt conviction, the *Chase* court found it significant that the deputy marshal had to assist the defendant Chase to his feet and that the trial was interrupted at least four times in order for the judge to read the contempt citations. *It was these interruptions, and not the mere refusal to rise or stand, that were found to constitute an "actual, material obstruction" contemplated by the federal contempt statute.* The *Chase* court was also careful to point out that the failure or refusal to rise or stand in the courtroom may amount to an actual and material obstruction of judicial administration *if* it distracts others in the courtroom or provokes a reaction on the part of others in the courtroom or is accompanied by a failure to become silent or focus attention on the business before the court. *In re Chase*, supra, 468 F.2d at 133.

In our cause, there is not any evidence that might warrant the inference that the act of the applicants not rising or standing provoked a reaction on the part of those other persons who were then in the courtroom or that the applicants were noisy or boisterous when they did not choose to rise or stand after Judge Floyd entered his courtroom on the day in question.

Just recently, the Supreme Court of Pennsylvania, in *Commonwealth v. Cameron*, 501 Pa. 572, 462 A.2d 649 (Pa.Sup.Ct. 1983), also see 38 *A.L.R. 4th* 555, answered the question whether a defendant's refusal to rise or stand, *without more*, is sufficient to sustain a direct contempt conviction in the negative. The Pennsylvania Supreme Court held that although the rising or standing requirement may constitute "misbehavior in the presence of the court," it is the resulting obstruction of the proceedings that is critical to sustaining a criminal contempt citation.

The annotation in 38 *A.L.R. 4th* 563, entitled "Failure to rise in state courtroom as constituting criminal contempt," points out that "The relatively few state cases considering the propriety of punishing any person for failing or refusing to stand in a courtroom when required to do so appear to indicate that such misconduct, *standing alone*, is not sufficient to justify a citation for criminal contempt, and that there must be some active disruption of court proceedings before such a penalty may be imposed." (564). (My emphasis.) I pause to state the following: Just last week, see *Chambers v. State*, 711 S.W.2d 240 (Tex.Cr. App. 1986), an aggressive and assertive majority of this Court found an *A.L.R.* annotation "persuasive" as authority to support its holding that unobjected to hearsay has probative value in judging the sufficiency of the evidence. However, this week it does not even acknowledge that work. What's going on here? If that work was authoritative last week, should it not also be authoritative this week? Or, is the reason the author of the majority opinion ignores it this week because what is stated herein is not to his and those judges who join his opinion's likings?

If one carefully analyzes the majority opinion, I believe that he or she will conclude, as I have done, that the bottom line in the opinion represents nothing less than the fact that the author of the majority opinion, and those

members of this Court who join his opinion, believe that the applicants were discourteous to the trial judge in this cause by refusing to rise or stand after he entered his courtroom on the day in question, and that such was both an abuse of process and an obstruction of the administration of justice, and because of this they should be summarily punished for such act, which is, in the view of those who vote for the majority opinion, an act that is apparently "honored only by civilized and sensible men." In short, they believe that without this ancient, traditional, ceremonial, or symbolic act, chaos would reign in our courtrooms. If there was no other way to mark the beginning of the court's session; if there was no other way to remind all that attention must be concentrated upon the business before the court; if there was no other way to remind all that the judge's control of the courtroom must be maintained with as little burden on the judge as possible; and if there was no other way to impress upon persons in the courtroom that at all times there must silence, except as the orderly conduct of business calls for speech, I might agree with the majority opinion. However, if one subscribes to the agency theory, as the majority opinion apparently does, see the dissenting opinion filed by Judge Campbell in this cause, why cannot the above be reduced to writing and have the agent, whoever that might be, such as the bailiff, court reporter, clerk, court coordinator, probation officer, prosecuting attorney, defense attorney, or perhaps all doing it in unison, utter these admonitions loudly to those in attendance in the courtroom? If this is done, and after the trial or appellate court judge takes his bench, a member of the audience violates one or more of the admonitions, and that person is held in direct or criminal contempt of court, then the majority opinion might make a little sense. However, given the facts and circumstances of this cause, it presently makes no sense at all.

Because the majority opinion erroneously holds that a person's mere refusal to rise or stand upon command after

the trial judge enters his courtroom, without more, is sufficient to sustain a direct criminal contempt conviction, I am compelled to respectfully dissent. I believe that opinions like this one do not cause our trial courts to gain respect from our citizenry, but, to the contrary, such opinions can actually breed disrespect for our courtrooms and our trial judges, and cause disturbances where before there were none.

CAMPBELL, Judge, dissenting.

This writer derives no particular pleasure from engaging in the "sport" of dissent writing, but the majority opinion in the instant case presents such an inviting target that I felt compelled to dust off my hunting license and don one of those marvelous British safari hats for the occasion.

I begin this sojourn by stating that I am in complete agreement that "the traditional rising in unison of persons present in a court can reasonably be thought to contribute to the functioning of the court," and that "it is a way of marking the beginning and end of the session and probably serves to remind all that attention must be concentrated upon the business before that court, the judges control of the courtroom must be maintained with as little burden on him as possible, and there must be silence, except as the orderly conduct of business calls for speech." *In re Chase*, 468 F.2d 128, 132 (7th Cir. 1972), quoting from *United States ex rel Robson v. Malone*, 412 F.2d 848 (7th Cir. 1969).

But the majority opinion with both its writing and research style strikingly, nay hauntingly, deja vu, elevates the "failure to rise in unison requirement" to per se contumacious conduct, and ultimately, direct contempt. This conclusion defies the dearth of case law in this area, and in doing perhaps the most mischief, defies one of those fundamental tenets of a free society which separates us from other mammals—the due process of law.

I. The Conduct

A. Applicant Krupps

I am in agreement with the majority's disposition of the conduct of applicant, Krupps.[14] Judge Floyd confronted Krupps in chambers and admonished *him* to rise when the judge entered the courtroom. Krupps, in defiance of this direct order from the judge, then intentionally refused to rise when the judge entered the courtroom. According to the federal case law cited in the majority opinion, this is clearly direct, contumacious conduct which is summarily punishable, because it was "personally observed by the judge" (*In re Oliver*, 333 U.S. 257, 275-276, 68 S.Ct. 499, 509, 92 L.Ed. 682) *after the judge had personally confronted and admonished Krupps.*[15]

B. The Six Other "contemptuous" Applicants

The majority opinion begins to unravel like a bad suit of clothes, when it postulates that court personnel, such as bailiffs, and implicitly, one imagines, court reporters, clerks, docket coordinators, probation officers, prosecutors, etc., may, through some sort of agency theory, observe contumacious conduct, report said conduct to the unsuspecting judge, thereby magically transforming constructive contempt into direct contempt, all in the name of and by the authority of being "officers of the court."

Judge Floyd stated in the documents of commitment that the applicants were held in contempt for "being disrespectful by failing to rise upon the entrance of the Court after being duly admonished and warned of consequences

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[14] The punishment that Krupps received will be discussed, infra.

[15] All emphasis is supplied throughout by the author of this opinion unless otherwise indicated.

of their failure to do so."[16] But the gravamen of contempt contains two elements which the judge must have personally observed to have found direct contempt: (1) an admonishment and warning of the consequences of failing to rise and (2) a failure to rise. I now examine the record to determine whether Judge Floyd was present and personally observed both elements for the six applicants.

Judge Floyd clearly observed the second element when he personally observed all of the applicants fail to rise on June 14, 1985. However, the record reflects that six of the applicants (H. Eddington, H. Matthews, V. Rose, L. Rose, R. Henley and J. Henley) did not receive an admonishment and warning of the consequences of failing to rise in the presence or hearing of Judge Floyd. See n. 3, infra. At no time was Judge Floyd present when these applicants were admonished and warned of the consequences of failing to rise.

The circumstances surrounding the direct contempt conviction of the six applicants who were not given an admonishment and warning in the presence of Judge Floyd are analogous to the circumstances in *Johnson v. Missis-*

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[16] The trial court did not deliver this warning in person. Nor was he present when the bailiff delivered this warning. In his affidavit before this Court, respondent Judge Floyd stated:

> "*I advised Deputy Collins to inform Mr.* [*the applicants*] that if they continued to show disrespect for the Court by not standing when Court convenes, I would hold them in contempt; and place them in jail for 30 days. *Deputy Collins returned to the courtroom to inform the* [*the applicants*] *of my decision.* Again, they informed Deputy Collins they would not stand. *Deputy Collins advised me of their decision* and I decided to let them 'sleep on it' without further discussion once we had recessed until 9:00 am on June, 1985. "... [the next morning,] *Deputy Collins advised them* that the Court would hold them in contempt and sentence them to 30 days in jail if they refused to stand when the Judge entered the courtroom. ...
>
> "*Deputy Collins advised the Court* again that they would not stand."

sippi, 403 U.S. 212, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971). See also *Ex parte Ratliff*, 117 Tex. 325, 3 S.W.2d 406 (1928). In *Johnson*, supra, the Supreme Court reversed a contempt judgment because of due process violations. In addition to the trial court's failure to take immediate sentencing action, the Court noted:

> "Moreover, from this record we cannot be sure that Judge Perry was personally aware of the contemptuous action when it occurred. The State's version of what happened is described as follows in its motion that petitioner show cause why he should not be punished for contempt:
>
> > '[T]he Sheriff and Deputy Sheriff Hayward seized Robert Johnson and immediately carried him before the Circuit Judge, Marshall Perry, and *related to the Judge what had transpired.* (Italics added)' [emphasis in original]
>
> As we said in *In re Oliver*, 333 U.S. 257, 275-276, 68 S.Ct. 499, 509, 92 L.Ed. 682,
>
> > 'If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing. . . .' " Id., 91 S.Ct. at 1780.

Judge Floyd, by relying upon information received from his bailiff for his knowledge of the contemptuous conduct of six of the applicants, did not personally observe all of the elements of the contempt. Therefore, the contempt was in the nature of a constructive contempt. I believe that six of the applicants (H. Edgington, H. Matthews, V. Rose, L. Rose, R. Henley and J. Henley) should have been accorded the due process required in a constructive contempt adjudication.

C. The Logical Import of Today's Majority Holding

Significantly, Krupps was at least given the opportunity to express to Judge Floyd his reason for not rising in the courtroom. Krupps replied obliquely that he was a "follower of Christ." The judge requested that Krupps elaborate, and implied that something could be worked out by allowing Krupps to remain outside the courtroom when the Judge entered. Krupps declined and, in fact, expressed his intent to defy the judge again, which he subsequently did.

What of the other six applicants? The majority says that the judge, *through Krupps*, offered them the same alternative that had been offered to Krupps. Does this make Krupps an "officer of the court?" The record is silent as to whether Krupps conveyed any message from the judge to any of the other six applicants. But even if the record affirmatively showed that Krupps did convey such a message, would the failure of the six applicants to rise in unison then constitute contempt of Judge Floyd, or would it constitute contempt of Krupps as an "officer of the court"?

The majority opinion simply cannot square its reasoning or holding with any sense of due process. The six applicants other than Krupps were given no admonishment, no alternative, and no explanation by the *judge* of the court. To favor them with the same summary treatment as Krupps is tantamount to standing the law of contempt on its bruised and battered ear. The logical conclusion to be drawn from the majority opinion is that the failure of spectators to rise in unison in a courtroom when a judge enters same constitutes direct contempt, punishable summarily without a hearing. To the physically handicapped—the deaf person, the paraplegic, and to those persons who have little or no command of the English language, I can only advise—avoid Texas courtrooms.

II. Was the length of the punishment given to Applicant Krupps an abuse of discretion?

The Legislature has restricted the sentencing power of Texas courts in contempt cases by limiting punishment to a fine of not more than $500, or not more than six months confinement in county jail, or both. V.A.C.S., art. 1911a, § 2(a). However, where the use of direct contempt is involved, the Supreme Court has held:

> "Appellate courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed. This Court has in past cases taken pains to emphasize its concern with the use to which the sentencing power has occasionally been put, both by remanding for reconsideration of contempt sentences in light of factors it deemed important, and by itself modifying such sentences. [citations omitted] The answer to those who see in the contempt power a potential instrument of oppression lies in assurance of its careful use and supervision, not in imposition of artificial limitation on the power." *Green v. United States*, 356 U.S. 165, 188, 78 S.Ct. 632, 645 (1958).

This Court has broad powers to entertain original writs of habeas corpus. Art. V, § 5, Tex. Const; *Ex parte Davis*, 171 Tex. Cr.R. 629, 353 S.W.2d 29, 32 (App. 1962). I believe that the careful review by this Court of claims of excessive direct contempt sentences falls within that broad power.[17] Such supervision in contempt cases is no less

[17] While it is true that the Legislature has limited the broad sentencing power of trial courts through Article 1911a, supra, there are no standards for determining when a sentence, though within the statutory range, would be considered excessive. In addition, there is no direct appeal from a contempt conviction. *Jacobs*, supra. Therefore, in reviewing direct contempt sentences, we should adopt the criteria set forth in *Yates*, [infra.] Without these criteria, a trial court could sentence a contemnor to six months in jail and a $500 fine and avoid review, no matter how insignificant the contemptuous conduct.

compelling than the constant review that we give to claims of excessive bail. See *Ex parte Davila*, 623 S.W.2d 408 (Tex.Cr.App. 1981); *Ex parte Rubac*, 611 S.W.2d 848 (Tex.Cr.App. 1981).

The Supreme Court has used several factors to determine whether a contempt sentence is appropriately within the discretion of a trial judge. Persistency of the defendant in repeating the contumacious conduct is an important consideration. *Yates v. United States*, 355 U.S. 66, 78 S.Ct. 128, 2 L.Ed.2d 95 (1957). "More over, the court should consider '. . . the extent of the willful and deliberate defiance of the court's order [and], the seriousness of the consequences of the contumacious behavior. . . .' " Id., 78 S.Ct. at 134, quoting *United States v. United Mine Workers*, 330 U.S. 258, 303, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947).

Examining Krupps' conduct in view of the criteria set forth in *Yates*, supra, I believe that a sentence of thirty days is disproportionate to the persistency, willfulness and seriousness of the conduct and is therefore excessive, and I would remand to the trial court for reassessment of a punishment that fits the conduct.[18]

MILLER, J. joins.

MILLER, Judge, dissenting.

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[18] Courts have reduced contempt sentences that resulted from a defendant's refusal to rise upon the judge's entrance on a number of occasions. In *Malone*, supra, the court reduced a 30-day sentence to four hours and a 15 day sentence to two and a half hours. In *United States v. Abascal*, 509 F.2d 752 (9th Cir. 1975), the court reduced a 90 day sentence to two weeks, though the conduct there included more than the mere refusal to rise. In *Comstock v. United States*, 419 F.2d 1128 (9th Cir. 1969), the court affirmed a sentence of 15 days in jail, but the conduct included more than the refusal to rise. In *Chase*, supra, the court reduced a ten month sentence to 30 days, though the defendant had refused to rise 99 separate times.

I join Judge Campbell's dissent and further disagree with the majority opinion's handling of appellant's final argument by stating:

> "Even if the rising requirement created a burden on applicants' religious freedom, Judge Floyd removed the burden by giving them the option of remaining outside until after court convened."

At 151. I would reach the merits of applicant Krupps' complaint about burdening his religious freedom and, under these facts, decide against him.

It occurs to me that the majority's reasoning concerning alternative choice as a substitute for the exercise of a constitutional right suffers from the same flaw as "separate but equal" thinking or providing that certain people can ride the bus but only if they sit in the back (I'm not going to even mention the "moment of silence" as an alternative to school prayer controversy). Granted, we are talking about that balance of least intrusive means of infringing on a constitutional right in favor of courtroom decorum and the relationship of the balance to the concept of direct contempt, not just the right to exercise the constitutional right. Still the two are so intertwined that the mere fact that an alternative was given in this case does not justify the majority's cursory dismissal of applicant's claim that the balance of right versus decorum should be tipped in his favor.

I dissent.

APPENDIX B

IN THE COUNTY COURT #3
OF
JEFFERSON COUNTY AT LAW
JEFFERSON COUNTY, TEXAS

THE STATE OF TEXAS
VS.

CHARLES EDWARD KRUPPS, JOHN ELLIS HENLEY, HAROLD O. EDGINGTON, VINCENT ROSE, LATTIE JO DARBY ROSE, HOWARD O. MATTHEWS, SR. AND ROSIE HENLEY

ORDER

On this 14th day of June 1985, Charles Edward Krupps, John Ellis Henley, Harold O. Edgington, Vincent Rose, Lattie Jo Darby Rose, Howard O. Matthews, Sr. and Rosie Henley were held in contempt of court and assessed 30 days in the county jail for being repeatedly disrespectful to the Court by failing to rise upon the entrance and exit of the Court after being duly admonished and warned of the consequences of their failure to do so.

It is therefore Ordered, Adjudged, and Decreed that without further notice or hearing, pursuant to Ex Parte Harvill 415 S.W.2d 174 (1967), Charles Edward Krupps, John Ellis Henley, Harold O. Edgington, Vincent Rose, Lattie Jo Darby Rose, Howard O. Matthews, Sr. and Rosie Henley are hereby held in contempt of Court and shall serve 30 days in this county jail.

/s/ DONALD J. FLOYD
JUDGE PRESIDING